

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PAUL WILLIAM WELSHEIMER,

Appellant.

No. 39260-7-II

UNPUBLISHED OPINION

Quinn-Brintnall, J. — Paul Welsheimer appeals the sentence imposed on his conviction of unlawful manufacture of methamphetamine. He claims that trial counsel failed to provide effective assistance because he did not request a drug offender sentencing alternative (DOSA). We affirm.¹

FACTS

The State charged Welsheimer with this crime on January 8, 2001. He fled the jurisdiction and avoided prosecution for eight years. He reappeared in March 2009, and pleaded guilty to the charge, stating that in 2000 and 2001, he had assisted in the manufacture of methamphetamine by providing key ingredients to the process.

¹ A commissioner of this court considered this matter pursuant to RAP 18.14 and referred it to a panel of judges.

At the sentencing hearing, both parties recommended a sentence at the bottom of the standard range, 51 months.² The State explained that, despite Welsheimer's prolonged attempt to avoid punishment, 51 months was appropriate because he had not been the primary manufacturer; he had his own substance-abuse problems at the time; and he had not been in trouble since his 2001 arrest. Defense counsel also pointed out that Welsheimer had assisted in the crime only to obtain drugs for himself.

The sentencing judge noted that a factor weighing against a low-end sentence was the serious nature of methamphetamine manufacture, considering both its effect on those who use it and the risk it poses for third parties who come into contact with the residue left by the process. However, he imposed the recommended sentence because Welsheimer had been crime-free since 2001.

ANALYSIS

To demonstrate ineffective assistance of counsel, the appellant must show that his attorney's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Appellant must affirmatively prove prejudice, showing a reasonable probability that the outcome would have been different, not just that there could have been some "conceivable effect" on the proceedings. *See State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006). The appellant must make these showings based on the record established in the proceedings below. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).³

² The range was 51 to 68 months.

³ Accordingly, we reject Welsheimer's suggestion that we direct the trial court to take additional evidence pursuant to RAP 9.11.

In reviewing a claim of ineffective assistance, we begin with a strong presumption that counsel was effective. *Riofta v. State*, 134 Wn. App. 669, 693, 142 P.3d 193 (2006), *aff'd*, 166 Wn.2d 358, 209 P.3d 467 (2009). We evaluate the reasonableness of counsel's performance from counsel's perspective at the time of the alleged error and in light of all of the circumstances. *Riofta*, 134 Wn. App. at 693.

A trial court has discretion to grant a DOSA if the offender meets all of the statutory criteria. RCW 9.94A.660. The DOSA alternative is intended to provide treatment to offenders judged likely to benefit from it. *State v. Grayson*, 154 Wn.2d 333, 337, 111 P.3d 1183 (2005). Where the crime charged is a violation of chapter 69.50 RCW, DOSA is available only to those offenders whose crimes involved only a small quantity of the controlled substance. RCW 9.94A.660(d).

The record does not indicate that Welsheimer was an appropriate candidate for DOSA. It does not appear that he was abusing drugs at the time of sentencing. He had apparently committed no new crimes since 2001, and he was anticipating resuming work pursuant to renewal of his commercial driver's license. In addition, it appears that his assistance with the manufacturing process continued for some time and it is, therefore, unlikely that his crime involved only a small amount of the drug. Finally, as the State pointed out, there was no additional charge or punishment for Welsheimer's absconding conduct. Defense counsel could reasonably have concluded that (1) Welsheimer was not eligible for DOSA and/or (2) the joint recommendation for the low end of the range had a better chance of success than a request for DOSA, opposed by the State.

Likewise, the record does not indicate that the court would probably have granted a

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DOSA request. The sentencing judge specifically noted the seriousness of the crime and the fact that Welsheimer had tried to avoid punishment for a long time. In short, on the basis of this record, Welsheimer has demonstrated neither deficient performance nor prejudice.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, J.

PENOYAR, A.C.J.